IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2014-CA-01139

DELLA SUMRALL and ROY SUMRALL **APPELLANTS**

VERSUS

SINGING RIVER HEALTH SYSTEM **APPELLEE**

ON APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI
NO. 2012-00,129(1)

BRIEF OF APPELLEE, SINGING RIVER HEALTH SYSTEM

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel certifies that the following persons or entities have an interest in the outcome of the case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Roy Sumrall, Appellant
2. Della Sumrall, Appellant
3. Singing River Health System, Appellee
4. Robert W. Smith, Counsel for Appellants
5. Brett K. Williams, Joshua W. Danos, Counsel for Appellee
6. Honorable Robert P. Krebs, Circuit Court Judge of Jackson County

Respectfully submitted, this the 11th day of February, 2015.

SINGING RIVER HEALTH SYSTEM

By: /s/ *Joshua W. Danos*
Joshua W. Danos (MSB#101501)
Brett K. Williams (MSB#7224)

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BRIEF OF APPELLEE, SINGING RIVER HEALTH SYSTEM

COMES NOW, the Appellee, Singing River Health System, in the above styled and numbered cause, by and through attorneys of record, Dogan & Wilkinson, PLLC, and files this brief, to show as follows:

I. STATEMENT OF THE ISSUES

1. Did the Circuit Court of Jackson County, Mississippi commit reversible error in allowing Defense Expert, Dr. Jim Corder to testify regarding the standard of care applicable to removal of a central line?
2. Did the Circuit Court commit reversible error in denying Plaintiff's Motion for Partial Summary Judgement?
3. Did the Circuit Court hold Plaintiffs to an improper burden of proof by stating in the Findings of Fact and Conclusions of Law, that "No one position of a patient during central line removal was so *overwhelmingly* required, that there truly was no uniformity that would equate to a standard of care to be followed by nurses" (emphasis added)?
4. Did the evidence at trial support the Circuit Court's Findings of Fact and Conclusions of Law?
5. Were various rulings made by the Circuit Court throughout the course of litigation erroneous? If erroneous, did such rulings cumulatively amount to denial of a fair trial?

II. STATEMENT OF THE CASE

On or about February 23, 2012, Plaintiff, Della Sumrall arrived at Ocean Springs Hospital, a facility owned and operated by Defendant, Singing River Health System, with a complicated case of acute cholecystitis (inflamation and/or irritation of the gallbladder). *T.T. page 399, line 19*

through page 400, line 11[1]. Based on her presentation, Dr. Edward Dvorak, a general surgeon, determined that the best course of action was to remove Plaintiff's gallbladder. *Id.* In anticipation of a lengthy postoperative stay, Dr. Dvorak ordered that a central line be placed in the Plaintiff[2]. *T.T. page 401, line 22 through page 402, line 3.* The line was placed by Dr. Paul Harris, an anesthesiologist, who indicated in medical charting that the line was placed in the external jugular vein. *T.T. page 119, line 17 through page 120, line 5.*

After surgery, Plaintiff was monitored and treated until February 29, 2012 when Dr. Dvorak intended for her to be discharged, and to that end, for her central line to be removed. *T.T. page 402, lines 4-24.* During the relevant time period, Chequita Steele was employed by Singing River Health System as a registered nurse. *T.T. page 305, lines 22-27.* On the date in question, she was tasked with caring for the Plaintiff, and had cared for her on previous days during that same hospital stay. *T.T. page 309, lines 4-9.* In the days leading up to the incident, Plaintiff informed nurse Steele that she could not breathe when laying flat. *T.T. page 310, lines 9-15.* Indeed, Plaintiff had a variety of medical complications and comorbidities which, in the opinion of Plaintiffs' own expert, can affect the ability of a patient to be placed in certain positions. *T.T. page 247, lines 12-16.* For instance, at the time of the incident, Plaintiff suffered from chronic obstructive pulmonary disease (COPD), had a partially collapsed lung (which had worsened between February 23, 2012 and February 29, 2012), and required tank oxygen. *T.T. page 246, lines 22-29* and *T.T. page 360, lines*

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1 For purposes of this Brief, the following abbreviations will be utilized: C.R. (Clerk's Record), T.T. (Trial Transcript), and R.E. (Record Excerpt).

2 The term "central line" is used to describe a central venous access device ("CVAD") through which health care providers can provide, among other things, medicines, fluids, and blood products.

21-29. Additionally, prior to the line removal, Plaintiff's total lung capacity was approximately 43% of predicted capacity, and her lung ventilatory flow rate was 17% of predicted value. *T.T. page 362, lines 6-23.*

On February 29, 2012, but prior to line removal, nurse Steele repositioned Plaintiff in the recliner, so that she laid at an angle of less than 90 degrees. *T.T. page 310, lines 20-27.* Later that day, Plaintiff remained in the recliner at an angle of less than 90 degrees. *T.T. page 311, lines 8-12.* In fact, approximately five minutes prior to the central line removal, nurse Steele charted that Plaintiff remained in the reclined position. *T.T. page 311, lines 10-15.* Nurse Steele testified that Plaintiff was positioned with her upper body approximately 30 to 45 degrees above supine[3] when she eventually removed the central line. *T.T. page 315, lines 2-7.*

Prior to removing the line, nurse Steele informed Plaintiff she would be removing her central line. *T.T. page 149, line 29 through page 150, line 9.* Nurse Steele then removed the dressing which covered the insertion site, cut the sutures holding the line in place, instructed Plaintiff to take a deep breath, hold it, and bear down[4], applied pressure to the insertion site with gauze, and removed the central line. *T.T. page 306, lines 10-21;* and *T.T. pge 311, line 26 through page 312, line 20.* Plaintiff's daughter (the only other individual present when the line was removed) conceded that nurse Steele followed this procedure. *T.T. page 166, line 26 through page 168, line 14.*

After removing the central line, nurse Steele held pressure on the exit site for approximately one (1) minute. *T.T. page 313, lines 2-8.* After one minute had elapsed, Plaintiff suffered some

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3 As will be addressed further herein, "supine" indicates lying flat on one's back, facing upward.

4 This will later be referred to as the "Valsalva" maneuver, which is utilized to create venous compression and intrathoracic pressure.

event, which manifested itself in the form of a straight glare, followed by labored breathing. *T.T. page 312, line 14 through page 313, line 1.* She then became unresponsive. *T.T. page 311, line 26 through page 312, line 2.* Nurse Steele attempted to summon nursing assistance via intercom, but was unsuccessful. *T.T. page 313, lines 9-22.* After another minute passed, nurse Steele was forced to leave the room and seek the help of the Rapid Response team. *T.T. page 313, lines 18-26.* After emergent treatment was rendered in Plaintiff's room, she was taken to the ICU for further care. *T.T. page 156, lines 5-13.* Eventually she was moved to a regular inpatient room and was discharged on March 19, 2012. *T.T. page 156, lines 18-24.*

It is uncontested that Plaintiff experienced some event during her stay on February 29, 2012[5]. It is similarly undisputed that Plaintiff suffered some neurological insult as a result of the event. Given the nature of the immediate appeal, the extent of the injuries is not at issue. However, as the cause of Plaintiff's injury is contested, some mention of her symptomology and the medical impressions surrounding her treatment is necessary. As conceded by Plaintiffs' expert, at the time of admission, Plaintiff was at high risk for a stroke. *T.T. page 96, lines 9-12.* Specifically, Plaintiff had high blood pressure, was a heavy smoker, suffered from diabetes, had high cholesterol, led a sedentary lifestyle, suffered from chronic obstructive pulmonary disease (COPD), and had arterial circulation problems. *T.T. page 96, lines 13-23*; *page 99, line 28 through page 100, line 4*; and *page 102, lines 2-7.* Prior to the incident, Plaintiff suffered from significant plaque blockage of several major arteries, including 50% blockage of the right coronary artery, and 100% occlusion of the left

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The etiology of the event however, is a hotly contested issue. Plaintiffs contend Mrs. Sumrall experienced an air embolism, and Defendant maintains she suffered from a stroke, or some cardiac event. These positions will be briefed in full below.

coronary artery. *T.T. page 98, lines 4-28.* A carotid ultrasound revealed that she also suffered from severe carotid stenosis, demonstrating approximately 70% occlusion. *T.T. page 101, lines 3-12.* Additionally, she had previously suffered a heart attack and had undergone bypass surgery. *T.T. page 96, lines 24-28.*

Plaintiff's symptoms following the event were indicative of a stroke, such as facial drooping and one-sided weakness. *T.T. page 105, lines 3-13*; *T.T. page 271, line 25 through page 272, line 3.* There was no diagnostic evidence (i.e. radiographic, laboratory-based, or otherwise) indicating Plaintiff suffered from an air embolism. *T.T. page 374, lines 6-8.* Based on the comorbidities existing at the time of the incident, in addition to the resulting symptoms, even Plaintiffs' expert was forced to admit that stroke was within the differential diagnosis for Mrs. Sumrall. *T.T. page 94, lines 22-23.* Dr. Edward Dvorak testified to his belief that Plaintiff did not suffer from an air embolism; rather, he believed she experienced a stroke or sudden cardiac arrest. *T.T. page 405, line 12 through page 407, line 1.* Similarly, Dr. John Weldon charted his belief that she had suffered a stroke. *See Plaintiff's Trial Exhibits 1 and 2,* Bates number "OS 0256". Finally, during the course of her treatment, Plaintiff was administered an Interdisciplinary Patient Plan of Care for Stroke, and her discharge instructions state, "[y]ou have had a stroke". *See Plaintiff's Trial Exhibit 1 and 2,* Bates numbers "OS 1862-1863" and "OS 1246".

III. COURSE OF PROCEEDINGS IN THE LOWER COURT

On or about May 18, 2012, a Complaint was filed against "Singing River Hospital Systems" and "Ocean Springs Hospital", alleging medical malpractice in relation to removal of Plaintiff's

central line as described above. *C.R. 24-27.* On June 22, 2012, Singing River Health System[6], filed its Answer and Affirmative Defenses. *C.R. 29-37.* Plaintiffs then unilaterally filed a notice of deposition for nurse Chequita Steele which became the subject of Defendant's Motion to Quash. *C.R. 45-57.* Plaintiffs responded and a joint teleconference with the trial court was held, the result of which was an Order denying the relief requested by Plaintiffs. *C.R. 73.* Plaintiffs then filed a motion to compel and for other relief on July 19, 2012, seeking costs and attorneys fees associated with his preparation for the cancelled deposition of nurse Steele. *C.R. 78-79.* Defendant responded on September 14, 2012, and the trial court refused to award attorneys fees relating to counsel's preparation *C.R. 294.* In doing so, the court noted that Plaintiffs' counsel "would have had to prepare for the deposition regardless of what date it was taken ... [which ultimately] occurred about two weeks later". *Id.* As referenced in that Order, the deposition of nurse Steele was indeed taken in this matter, as were the depositions of Dr. John Weldon, Plaintiffs Roy and Della Sumrall, Plaintiffs' daughters (Nina Sumrall and Tina Danley), and Plaintiffs' expert witnesses (Dr. James Martin, Dr. Lidgia Vives, and Crystal Keller, R.N.). *Id.*

Plaintiffs attempted to depose Dr. Edward Dvorak, but were unwilling to pay for his time; this issue was the subject of an interlocutory appeal, which was ultimately dismissed at Plaintiffs' behest[7]. *C.R. 567.* In any event, Plaintiffs were not deprived of Dr. Dvorak's testimony, as he was called as a witness at trial.

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6 Singing River Health System noted in the Answer that it was incorrectly named as Singing River Hospital Systems and Ocean Springs Hospital.

7 Plaintiffs suggest that the trial court erred in its ruling relating to Dr. Dvorak's deposition, then confesses that "Plaintiffs do not appeal the ruling as to Dr. Dvorak." It is unclear what Plaintiff's motive is in this regard.

After much discussion about the proper parties to litigation, on or about March 1, 2013, Plaintiff filed a Motion to Substitute Correct Name Pursuant to Rule 9(h). *C.R. 322.* The motion sought to replace Defendant "Singing River Hospital Systems" with "Singing River Health System", but failed to request dismissal of "Ocean Springs Hospital" from the suit. *Id.* Defendant filed a response to this motion, and in the alternative, moved to dismiss "Ocean Springs Hospital" as a defendant, as it is not a proper legal entity. *C.R. 433-436.* In support of this motion, Defendant attached Singing River Health System Bylaws, Correspondence from the Jackson County Board of Supervisors, an Independent Auditing Report, Correspondence from the Internal Revenue Service, and documentation from the United States Department of Health, Education, and Welfare, each of which demonstrates that Singing River Health System (the proper party to this action) is a governmental entity comprised of two divisions: Singing River Hospital, located in Pascagoula, MS, and Ocean Springs Hospital, located in Ocean Springs, MS. *Id.* On August 6, 2013, the trial court granted Plaintiffs' Motion to Substitute, and Defendant's Motion to Dismiss "Ocean Springs Hospital." *C.R. 784.*

On October 18, 2013, Defendant filed a Second Amended Designation of experts. *C.R. 1280-1282.* The designation identified Dr. James Corder, an anesthesiologist and internal medicine physician (internist), to testify regarding the applicable standard of care, that no breach of any standard occurred, and to lack of causation. *Id.* He was also designated to counter the standard of care and causation opinions of Plaintiffs' experts as set forth in their respective depositions. *Id.* Despite these designations, Plaintiffs neglected to depose Dr. Corder. Instead, Plaintiffs filed a motion to exclude Dr. Corder's standard of care opinions, and a motion for partial summary judgment regarding standard of care. *C.R. 800-872.* Defendant responded to the motions, and filed

its own Motion for Summary Judgment, based on the premise that Plaintiffs, and their experts had presented multiple and conflicting theories of the applicable standard of care. *873-878.* Defendant argued that Plaintiffs' presentation of conflicting standards of care for patient positioning during central line removal demonstrated the absence of any such standard. *Id.* The Court denied both parties' motions for summary judgment, and denied Plaintiffs' motion to exclude Dr. Corder's opinions. *C.R. 1305-1306.*

Trial began on December 9, 2013 and concluded on December 11, 2013. *C.R. 1330.* Plaintiffs first called Dr. Lidgia Vives who testified regarding causation and standard of care (over objection by Defendant). *T.T. pages 19-135.* She then called Nina Musgrove (Plaintiffs' daughter), Tina Danley (Plaintiffs' daughter), Jenna Blaine (one of Defendant's registered nurse employees), Crystal Keller, R.N. (Plaintiffs' standard of care expert), and Roy Sumrall (co-Plaintiff and husband of Mrs. Sumrall). *T.T. pages 149-294.* Plaintiffs also provided the Court with the deposition transcripts of the Plaintiff, Della Sumrall, Dr. James Martin (a treating physician), Dr. John Weldon (a treating physician), and nurse Chequita Steele (the medical provider that removed the central line). *See Plaintiffs'Trial Exhibits 4, 5, 6, and 8.* After the Court denied Defendant's motion for dismissal under Rule 52, the court entertained the testimony of nurse Chequita Steele, Dr. Jim Corder (Defendant's expert on standard of care, breach, and causation), and Dr. Edward Dvorak (the general surgeon that removed Plaintiff's gallbladder). *T.T. 302-415.*

At the close of evidence, the trial court requested that each party submit proposed Findings of Fact and Conclusions of Law. *T.T. page 418, lines 17-25.* After consideration of each party's proposal, on or about April 4, 2014, the Court entered its own Findings of Fact and Conclusions of Law, followed promptly by a Final Judgment. *R.E. 1-6*; *C.R. 1330.* On May 16, 2014, Plaintiffs

filed a Motion to Alter/Amend Findings of Fact and Conclusions of Law or Alternatively for New Trial. *C.R. 1331-1335.* Defendant responded on May 27, 2014, and an oral argument ensued. *C.R. 1336-1351.* On July 18, 2014, the trial court denied Plaintiffs' motion, and the immediate appeal was filed. *C.R.1352.*

IV. SUMMARY OF THE ARGUMENT

A. Dr. Corder Was Properly Designated to Testify Regarding Standard of Care, and Was Qualified, Tendered, and Accepted as an Expert Familiar With the Standard of Care Applicable to Removal of Central Lines

First, Plaintiffs have appealed the trial court's decision allowing Dr. Jim Corder to testify regarding the standard of care (or lack thereof) applicable to removal of a central line. In short, Plaintiffs assert the trial court erred in the following ways:

A. Allowing Dr. Corder to testify at trial regarding standard of care when he "was not designated, not qualified, and not tendered as a nursing expert".

B. Allowing Dr. Corder to offer standard of care testimony not included in his expert designation.

See Appellant's Brief. Contrary to Plaintiff's assertions, Dr. Corder was designated to testify regarding nurse Steele's actions, and that such actions did not deviate from the applicable standard of care. *R.E. 7-10.* Additionally, Dr. Corder was qualified, tendered, and accepted as an expert in the fields of anesthesiology and internal medicine. *T.T. page 346, line 26 through page 347, line 6.* During qualification, Dr. Corder testified that he, as an anesthesiologist and internist, was very familiar with vascular access, has placed over one thousand central lines, and had experience removing central lines. *T.T. page 341, lines 19-23,* and *page 342, lines 4-16.* Finally, Dr. Corder testified he was familiar with the standard of care for removal of central lines. *T.T. page 342, lines* 17-22, and *346, lines 4-9.* Counsel for Plaintiff did not question Dr. Corder regarding his

qualifications. *T.T. page 346, line 26 through page 347, line 6.* As such, the opinions of Dr. Corder were disclosed in expert designations, and he was properly qualified, tendered, and accepted by the court as an expert familiar with the standard of care applicable to removal of central lines. For these reasons, the trial court's ruling on this issue must be affirmed.

B. The Trial Court's Denial of Plaintiffs' Motion for Partial Summary Judgment on Standard of Care Was Proper as Plaintiffs Failed to Meet Their Burden

Next, Plaintiffs urge this Court to reverse the lower court's decision denying Plaintiffs' Motion for Partial Summary Judgment. *See Appellants' Brief at p. 22.* Plaintiffs' Motion for Partial Summary Judgment sought judicial establishment of the nursing standard of care. *C.R. 834-872.* The Motion asserted there was but one, "undisputed standard of care", which had been "set forth by Plaintiffs' experts via sworn answers to interrogatories, in sworn depositions, and in very precise language by applicable medical literature." *Id.* However, as borne out by Defendant's response, Plaintiffs did not meet the heavy burden required for summary judgment. *C.R. 1099-1149* Instead, the allegations in the Complaint, the medical literature provided by Plaintiffs, sworn discovery responses provided by Plaintiffs, Plaintiffs' expert designations, and sworn testimony of Plaintiffs' experts, provided distinct and *contradictory* pronouncements of the alleged standard of care. *Id.* As such, the Plaintiffs failed to provide evidence sufficient to meet their burden of proof for summary judgment.

C. The Trial Court Did Not Hold Plaintiffs to Any Burden Beyond Preponderance of the Evidence

Plaintiffs' third attempted assignment of error focuses on the word, "overwhelmingly", which was used in the trial court's Findings of Fact and Conclusions of Law. Specifically, the Court stated, "[n]o one position of a patient during central line removal was so *overwhelmingly* required, that there

truly was no uniformity that would equate to a standard of care to be followed by nurses" (emphasis added). *R.E. 1-6.* Plaintiffs unabashedly twist this phrase into some purported attempt by the trial court to hold them to a higher burden of proof than that which the law requires. *See Appellants' Brief at p. 25.* Clearly, the trial court was referring to the variations on patient positioning utilized in the medical field during central line removal, as opposed to Plaintiffs' burden of proof. Therefore, Plaintiffs' argument on this issue is without merit.

D. The Trial Court's Findings of Fact and Conclusions of Law Are Supported by Substantial Evidence Presented at Trial

Plaintiffs also challenge the court's Findings of Fact and Conclusions of Law, claiming they are against the overwhelming weight of the evidence. *See Appellants' Brief at p. 28.* Specifically, Plaintiffs question the sufficiency of the evidence on the standard of care, whether Plaintiff could tolerate the Trendelenberg position at the time of line removal (i.e. purported breach), and causation (air embolism vs. stroke or some other cardiac event). *Id.* As will be demonstrated below, the testimony of Dr. Corder, the medical literature entered into evidence, and even the testimony of Plaintiffs' experts establish there is no national standard of care for patient positioning during removal of a central line. There is also credible and sufficient evidence that Plaintiff could not tolerate the Trendelenberg position on the day in question. And finally, the record is rife with evidence that Plaintiff suffered a stroke or some other cardiac event responsible for her neurological injury, as opposed to an air embolism. It is important to note that the trial court found in favor of Defendant on the issues of standard of care, breach, and causation. As such, should this Court find error with the trial court's ruling in any one or two respects, the remaining finding(s) and/or ruling(s) would require affirmance of the lower court's ultimate decision.

E. No Rulings Adverse to Plaintiffs Were Erroneous or Reversible

Finally, Plaintiffs quarrel with "cumulative" adverse rulings made by the trial court over the course of two years. *See Appellants' Brief.* In large part, this portion of Plaintiffs' argument serves as a review of errors claimed above (i.e. the trial court allowing into evidence Dr. Corder's opinions on standard of care, the denial of Plaintiffs' Motion for Partial Summary Judgment, and the trial court's ultimate holding in the Findings of Fact and Conclusions of Law). Additional charges of error are as follows:

1. The trial court's "refus[al] to enforce [a] duly served subpoena" on nurse Steele;
2. The trial court's requirement that Dr. Dvorak be compensated for his deposition time;
3. The trial court's refusal to award attorney's fees for time expended by Plaintiffs' counsel in preparation for the deposition of nurse Steele; and
4. Dismissal of Ocean Springs Hospital as a Defendant.

See Appellants' Brief. Plaintiffs fail to note several factual and legal bases for the above rulings. For instance, the "duly served subpoena" was subject to a Motion to Quash at the time of deposition. *C.R. 45-57.* Additionally, the issue of payment for Dr. Dvorak's time prompted Plaintiffs to file an Interlocutory Appeal, an appeal that was voluntarily dismissed. In any event, Plaintiffs can claim no harm from the Dvorak ruling, as he ultimately testified at trial. Next, while the trial court denied Plaintiffs' motion for attorney fees relating to deposition preparation, the Order denying same notes that counsel for Plaintiffs "would have had to prepare for the deposition regardless of what date it was taken ... [which ultimately] occurred about two weeks later". *C.R. 294.* Finally, Defendant filed a Motion to Dismiss Ocean Springs as a Defendant in this action, and provided numerous items of evidence in support of its contention that the proper party at issue is Singing River Health System.

As such, what Plaintiffs perceive as "cumulative" erroneous and adverse rulings, actually amounts to well-reasoned and proper determinations. Moreover, Plaintiffs have failed to demonstrate how any above ruling, even if erroneous, resulted in an unfair trial. Therefore, Plaintiffs' appeal of these rulings must be dismissed.

V. ARGUMENT

A. Standard of Review

Plaintiffs are appealing the admission of certain expert opinions. *See Appellant's Brief at p. 18.* "A trial court's admission or exclusion of expert testimony is reviewed for abuse of discretion." *Miss. Transp. Comm'n v. McLemore,* 863 So.2d 31 (Miss. 2003). Such a decision "will stand unless the reviewing court concludes that the decision was arbitrary and clearly erroneous, amounting to an abuse of discretion." *Worthy v. McNair*, 37 So.3d 609, 614 (Miss. 2010). See also *Hubbard v. Wansley*, 954 So.2d 951 (Miss. 2007) and *Palmer v. Biloxi Reg'l Med. Ctr*., 564 So.2d 1346 (Miss. 1990)). So too is the standard of review for Plaintiffs' allegation of "cumulative errors" in evidentiary matters. *Whitten v. Cox*, 799 So.2d 1, 13 (Miss. 2000). Additionally, the Appellate Courts in Mississippi have specifically acknowledged that "in a bench trial, the trial judge enjoys great discretion with respect to the admission of evidence", such as expert testimony. *Delta Regional Med. Center v. Taylor*, 112 So.3d 11 (2012).

Plaintiffs also challenge the trial court's denial of partial summary judgment. *See Appellant's Brief at p. 22.* As the Supreme Court of Mississippi has stated on numerous occasions:

> The standard of review employed by this Court in matters regarding summary judgment is well-settled. Our appellate standard for reviewing the grant or denial of summary judgment is the same standard as that of the trial court under Rule 56(c) of the Mississippi Rules of Civil Procedure. This Court employs a *de novo* standard of review of a lower court's grant or denial of summary judgment and examines all the

> evidentiary matters before it-admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. The evidence must be viewed in the light most favorable to the party against whom the motion has been made. If, in this view, there is no genuine issue of material fact and, the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his favor. Otherwise, the motion should be denied. ... In addition, the burden of demonstrating that no genuine issue of fact exists is on the moving party. That is, the non-movant should be given the benefit of the doubt. *McCullough v. Cook*, 679 So.2d 627, 630 (Miss.1996) (quoting *Mantachie Natural Gas Dist. v. Mississippi Valley Gas Co.*, 594 So.2d 1170, 1172 (Miss.1992); *Clark v. Moore Mem'l United Methodist Church,* 538 So.2d 760, 762 (Miss.1989)).

Leslie v. City of Biloxi, 758 So. 2d 430, 431-432 (Miss. 2000).

The immediate appeal also concerns the proper burden of proof applied by the trial court to the facts at issue. *See Appellants' Brief at p. 25.* This necessarily raises a question of law. In Mississippi, questions of law are reviewed *de novo. Estate of Finley v. Finley*, 37 So.3d 687, 689 (Miss.App. 2010).

The Plaintiffs additionally challenge the weight of the evidence supporting the trial court's Findings of Facts and Conclusions of Law. *See Appellants' Brief at p. 28.* The Mississippi Supreme Court has stated:

> This Court's standard of review of a judgment from a bench trial is well settled. "A circuit court judge sitting without a jury is accorded the same deference with regard to his findings as a chancellor," and his findings are safe on appeal where they are supported by substantial, credible, and reasonable evidence. *Puckett v. Stuckey*, 633 So.2d 978, 982 (Miss.1993); *Sweet Home Water & Sewer Ass'n v. Lexington Estates, Ltd.*, 613 So.2d 864, 872 (Miss.1993); *Allied Steel Corp. v. Cooper*, 607 So.2d 113, 119 (Miss.1992). This Court will not disturb those findings unless they are manifestly wrong, clearly erroneous or an erroneous legal standard was applied. *Bell v. City of Bay St. Louis*, 467 So.2d 657, 661 (Miss.1985).

City of Jackson v. Perry, 764 So. 2d 373, 376 (Miss. 2000).

B. Dr. Jim Corder and His Opinions Regarding Standard of Care

1. Dr. Corder Was Sufficiently Designated to Testify Regarding Standard of Care

Plaintiffs claim Dr. Corder's expert designation was insufficient to permit him to testify regarding the applicable standard of care for removal of central lines. *See Appellants' Brief at p. 18.* As such, Plaintiffs assert the Motion to Exclude Dr. Corder's standard of care opinions should have been granted. *Id.*

"Mississippi Rule of Civil Procedure 26(b)(4) requires a party to identify each person whom they expect to call as an expert witness at trial, and to state the subject matter and substance of their testimony, as well as a summary of the basis for each opinion." *Warren v. Sandoz Pharmaceuticals Corp.*, 783 So.2d 734, 742 (Miss. App. 2000); Miss. R. Civ. P. 26(b)(4). Contrary to Plaintiffs' assertions, Defendant's Second Amended Designation of Experts alerts Plaintiffs that Dr. Corder will testify as to the alleged actions taken by nurse Steele, and that such actions did not deviate from any standard of care. *R.E. 1-6.* Specifically, the Designation states:

> Mrs. Sumrall was admitted to Singing River Health System on February 23, 2012 with complaints of abdominal pain, nausea, and diarrhea. She was diagnosed with cholecystitis, dehydration, leukocytosis, and hyponatremia. During her time at the hospital, a cholecystectomy was performed, and a central line was inserted. She was properly treated for post-operative purposes until February 29, 2012, when she was deemed ready for discharge.
>
> Nurse Chequita Steele was preparing Mrs. Sumrall for discharge, and in doing so, removed Plaintiff's central line. Plaintiff experienced difficulty breathing when placed in the supine position, and as such, **Nurse Steele reclined Mrs. Sumrall in a chair as much as she could tolerate prior to removal of the central line. Nurse Steele then removed Plaintiff's plastic dressings, cut the sutures, instructed Plaintiff to take a deep breath and bear down, removed the line, placed gauze dressing over the incision, and held pressure**.

Id. The designation further states the relevant expert will opine that these actions "**did not deviate**

from the standard of care." *Id.* Additionally, the designation indicates, "Dr. Corder will be offered to contradict any opinions on standard of care and/or causation as stated in the depositions of Plaintiffs' experts, Dr. Lidgia Vives and Crystal Keller, R.N." *R.E. 1-6.* Finally, the expert designation discloses the bases of Dr. Corder's opinions as follows:

> Dr. Corder's opinions are based upon his years of experience and training as a medical physician, the relevant medical literature, his educational background, as well as his review of the medical records, depositions and pleadings filed in the above referenced lawsuit.
> ...
> Dr. Corder has also reviewed the depositions of Dr. Vives and Nurse Keller, as well as all medicals/documents produced through discovery in this case.

Id. The designation clearly sets out the premises for Dr. Corder's opinions on standard of care (i.e. nurse Steele's actions prior to and during central line removal). *Id.* It also unequivocally states Dr. Corder's opinion that such actions fall within the applicable standard of care for removal of a central line. *Id.* This designation regarding standard of care satisfies any and all sufficiency requirements imposed by Miss. R. Civ. P. 26, including, "the subject matter and substance of their testimony, as well as a summary of the basis for each opinion". *Warren*, 783 So.2d 734, 742 (Miss. App. 2000); Miss. R. Civ. P. 26(b)(4). Given the above, Dr. Corder was properly designated to testify regarding standard of care in this matter, and the trial court's ruling must be affirmed.

However, if this Court finds said expert designation lacking, Plaintiffs' appeal fails nonetheless or it is procedurally barred. In Mississippi, "if an answer to an interrogatory regarding an expert witness who will testify at trial is deemed insufficient by opposing counsel, some means of notice of such insufficiency must be given to the opposing party in order to let them know that additional information is desired." *Warren*, 783 So.2d 734, 742 (Miss. App. 2000). "Therefore, under the Mississippi Rule of Civil Procedure when a party receives [what it believes is an] evasive

or incomplete answer under Mississippi Rule of Civil Procedure 26(b)(4)(A)(I) and 37, the burden once again shifts to the party who has propounded discovery, and they are required to seek relief from the court before sanctions can be imposed", such as excluding the testimony altogether. *Id.* It is "imperative for [the party seeking expert disclosure] to first seek relief from the trial court and have an order entered before seeking sanctions." *Id* at 743. Plaintiff failed to take this imperative action prior to seeking exclusion of Dr. Corder at trial. Therefore, even if the designation is lacking, Plaintiff did not take the requisite action to preserve this issue for appeal.

2. Dr. Corder Was Sufficiently Qualified as an Expert on Removal of Central Lines

Plaintiffs assert Dr. Corder was "tendered and qualified *only* as an anesthesiologist and internist" *See Appellants' Brief*, page 19. This much is true. However, Plaintiffs attempt to infer from this fact that Dr. Corder is incapable of rendering opinions on the applicable standard of care for removal of central lines. *Id.* What Plaintiffs refuse to acknowledge is that central line removal is undertaken by more than one specialty or sub-specialty.

In Mississippi, there is no requirement that an expert in a medical malpractice case be a specialist in the same area as the doctor about whom the expert is testifying. *Hubbard v. Wansley*, 954 So. 2d 951, 957 (Miss. 2007). A medical expert need only establish that he is sufficiently familiar with the [practitioner's] specialty in order to testify about the standard of care owed to the patient. *Id.* In this case, the question involves a procedure rather than a specialty, however the same principle applies.

At trial, Dr. Corder demonstrated he was, as a board certified anesthesiologist, familiar with the proper procedure for central line removal. In relevant part, during expert qualification, Dr. Corder testified as follows:

Q. Can you give me the benefit of your education, training and experience?
A. Undergraduate was at Wayne State University in Detroit, Bachelor's Degree in chemistry. Medical school was also at Wayne State University. My post-graduate training was a combined internal medicine, anesthesiology critical care residency/fellowship at the University of Florida.
Q. Are you Board Certified in any specialty?
A. Yes, sir; internal medical and anesthesiology.
...
Q. Are you familiar with vascular access?
A. Yes, sir.
Q. I assume as an anesthesiologist you do this on a regular basis?
A. Yes, sir, many, many times.
...
Q. ... Do you actually see patients [currently]?
A. All the time.
...
Q. Dr. Corder, have you placed central lines before on patients?
A. Yes.
Q. How many?
A. In excess of a thousand. I long ago lost count.
Q. Is that something an anesthesiologist normally does?
A. Yes it is. ...
Q. Have you ever removed central lines?
A. Yes, sir.
Q. And we've heard the testimony about the Valsalva procedure, and placing pressure, and having them hold their breath and hold it. Is that consistent with your education and training?
A. For the most part. All of those are techniques to optimize removal of a central line.
...
Q. ... Are you familiar with the standard of care, or lack of standard of care, with respect to removal of a central line?
A. It's basically become obvious there is no national standard of care for positioning or for removal of a central line.

T.T. page 340, line 16 through page 346, line 9. As such, while Dr. Corder was not offered as an expert in the field of nursing, he undeniably demonstrated that he is sufficiently familiar with the relevant procedure (removal of a central line) in order to testify about the standard of care owed to the patient. *Hubbard*, 954 So. 2d 951, 957 (Miss. 2007).

Notably, prior to trial, Defendant attempted to exclude any opinions from Plaintiffs' expert,

Dr. Lidgia Vives (a neurologist) regarding standard of care, because she was not familiar with the standard of care applicable to nurses removing central lines. *C.R. 924-972*. In other words, Defendant made a similar argument to that being urged by Plaintiff on appeal, but as to a different physician. *Id.* Plaintiff filed a response, based in part, on Dr. Lidgia Vives's[8] testimony that "the standard of care for nurses and physicians ... is the same". *C.R. 1200-1229.* She was asked specifically about her lack of training in the field of nursing, and whether that had any impact on her standard of care opinions in this case. *Id.* She responded, "As a doctor, I can have an opinion of what should be done. And the nurses' behavior should obey science. We cannot have two ways of doing the same thing." *Id.*

After citing this deposition testimony in the Response to Defendant's Motion to Exclude, Plaintiffs briefed the trial court as follows:

> [I]t is not a requirement that a proposed expert be a specialist in a particular branch of the medical profession as long as the expert is familiar with the standards of the specialty. *Caldwell v. Warren*, 2 So.3d 751 (Miss. Ct. App. 2009). The expert must be sufficiently familiar with the standard of care by knowledge, skill, experience, training or education. *Figueroa v. Orleans*, 42 So.3d 49 (Miss. Ct. App. 2010).
>
> We have no disagreement with these broad statements of controlling law but we find it inexplicable that Defense counsel would then state illogical conclusions such as contending Dr. Vives is not qualified to testify on nursing standards. Dr. Vives quite concisely testified she has installed and removed numbers of central lines, that she has worked beside and supervised nurses in proper procedure to remove central lines, that she is familiar with the applicable medical literature governing nurses in the removal of central lines, and that the standards of central line removal are the same for doctors and nurses.
>
> Defense counsel urges the court to change existing law to require that a doctor go to nursing school to testify as to a nursing standard of care. We think such a change

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8 As will be discussed further herein, Dr. Vives is a non-practicing, vascular neurologist retained by Plaintiffs in this matter to provide standard of care and causation opinions. *T.T.* page 22, lines 19-29. She did not attend nursing school, has no training in the nursing field, and is not a nurse "teacher". *C.R. 924-972.*

> would be unwise and would ignore binding precedent. See *West v. Sanders Clinic for Women, P.A.*, 661 So.2d 714, 719 (Miss. 1995) (It is the scope of the witness's knowledge and not the artificial classification by title that should govern the threshold question of admissibility.) Also, *Pharr v. Anderson Infirmary Benevolent Assoc*., 656 So.2d 790 (Miss. 1995) (General surgeon can testify as to standard of care of family doctor.)

C.R. 1200-1229. Based on this testimony and argument, the Court denied Defendant's Motion to Exclude Dr. Vives's testimony on standard of care. Now that Dr. Vives has testified at trial, Plaintiffs apparently hold a different view of the law in Mississippi.

In any event, Dr. Corder was sufficiently designated to testify regarding standard of care in this matter. *R.E. 1-6* At trial, he was qualified, tendered and accepted as an expert by the court as both an anesthesiologist and internist. *T.T. page 346, line 26 though page 347, line 6.* During qualification, Dr. Corder expressed and demonstrated his familiarity with placement and removal of central lines. *T.T. page 340, line 16 through page 346, line 9.* Pursuant to Mississippi law, this familiarity allows him the ability to testify regarding the standard of care applicable to removal of central lines. *Hubbard*, 954 So. 2d 951, 957 (Miss. 2007). The Court did not abuse its discretion in allowing Dr. Corder to testify regarding standard of care, and as such the trial court's ruling on this matter must be affirmed.

C. Plaintiffs' Motion for Partial Summary Judgment on Standard of Care Was Properly Denied

Again, Plaintiff moved the trial court for partial summary judgment seeking judicial determination of what they termed an "undisputed standard of care". *C.R. 834-838.* According to that motion, the standard of care for removal of a central line requires the practitioner to "position the patient with the catheter exit site at or below the level of the heart." *Id.* Defendant responded, and concurrently filed a Motion for Summary Judgment, urging the Court to dismiss the case in its

entirety, as Plaintiffs had failed to meet their burden in providing evidence of a national standard of care. *C.R. 873-878, 973-1093,* and *1099-1149.* In its response to the Motion for Partial Summary Judgment, Defendant incorporated by reference its own Motion for Summary Judgment on the same issue. *C.R. 1099-1149.*

Again, Defendant's argument was that Plaintiffs had failed to provide evidence of the national standard of care. *Id.* Rather than establishing *the* standard of care for patient positioning during central line removal, Plaintiff had, at the summary judgment stage, offered numerous variations, including the following:

1. The standard of care requires a patient to be placed in the prone position (the Complaint). *R.E.. 11-14.*

2. The standard of care requires a patient to be placed in something other than the upright position (Plaintiffs' Response to Interrogatory 23). *R.E. 15.*

3. The standard of care requires a patient to be placed in the Trendelenberg position; no other position is acceptable (Plaintiffs' Expert Designation) (Deposition Transcript of Lidgia Vives, page 37, lines 5-20). *R.E. 16-27 and R.E. 28-29.*

4. The standard of care requires a patient to be placed in the Trendelenberg position, or if not tolerated, the supine position, or if not tolerated, the lowest position tolerated by patient (i.e. Fowler's position) (Deposition Transcript of Crystal Keller, page 44, lines 2-5). *R.E. 30-31.*

5. The standard of care requires a patient to be placed with the central line insertion site below the heart (See Plaintiffs' Supplemental Discovery Responses). *R.E. 32-33.*

Defendant even attached a diagram to its response, demonstrating the conflicting standards Plaintiffs had then proposed throughout the litigation (supine vs. Fowler's vs. prone vs. Trendelenberg). *R.E. 34.*

Defendant also provided medical literature, some of which indicates patients may be placed above supine, or even in the sitting position when central lines are removed. *R.E. 35-62.* Indeed,

some hospital policies and procedures did not require any particular positioning whatsoever (London Health Sciences Centre, Procedure for Removal of Central Venous Catheters) (Hancock Medical Center, Central Line Procedures). *R.E. 57-62.* Finally, Defendant also referred to its designated experts who were expected to testify that nurse Steele's positioning of Plaintiff in this matter did not violate any standard of care. *C.R. 1099-1149.*

Contrary to Plaintiffs' assertion that Defendant relied solely on "argument by its counsel" in contesting the Motion for Partial Summary Judgment, Defendant utilized Plaintiffs' Complaint, their own sworn Interrogatories, their experts' sworn testimony, and pertinent medical authority to demonstrate the lack of any such standard. *Id.* As such, the trial court's denial of Plaintiffs' Motion for Partial Summary Judgment must be affirmed.

D. The Burden Placed on the Plaintiffs at Trial

In perhaps the most curious argument made by Plaintiffs on appeal, it is suggested that the trial court's use of the word "overwhelmingly" in the Finding of Facts and Conclusions of Law somehow indicates that Plaintiffs were held to a higher burden than preponderance of the evidence. *See Appellants' Brief at p. 25.* In that order, the trial court stated, "[n]o one position of a patient during central line removal was so *overwhelmingly* required, that there truly was no uniformity that would equate to a standard of care to be followed by nurses" (emphasis added). *R.E. 1-6.*

It is not disputed that the proper burden of proof in this matter is preponderance of the evidence. The trial court clearly recognized this, as the order also included the following language:

> *Based on the preponderance of the evidence* presented for the Court's consideration, the Court finds as a matter of fact that there is no recognized applicable standard of nursing care with regard to patient positioning during removal of a central line.
> ...
> *Based on a preponderance of the evidence* before the Court, the Court cannot

> conclude that Nurse Steele's removal of the plaintiff's central line caused an air embolism that resulted in the damages claimed by the plaintiff.
> ...
> In order to prove this cause of action the plaintiff must establish *by a preponderance of the evidence* that the defendant breached an established standard of care and that such breach proximately caused the plaintiff's damages.
> ...
> The Court finds that the plaintiff failed to meet the burden of proving their cause of action by a *preponderance of the evidence.*

R.E. 1-6. (emphasis added). Based on this language, the trial court held the Plaintiffs to the proper burden. The word "overwhelmingly" is used in the Finding of Fact and Conclusions of Law to indicate the prevalence in the United States of what Plaintiffs perceive as the standard of care for patient positioning. In other words, the trial court found that placing the patient in the Trendelenberg position prior to central line removal is not practiced with sufficient uniformity as to deem it the national standard of care. As such, Plaintiffs were held to the proper burden of proof, and the court's Findings of Fact and Conclusions of Law must be affirmed.

E. The Trial Court's Findings of Fact and Conclusions of Law Comported with the Evidence Presented at Trial

Plaintiffs assert that the trial court's ultimate ruling was against the overwhelming weight of the evidence. *See Appellants' Brief at p. 28.* Specifically, they question the sufficiency of the evidence on the standard of care, whether Plaintiff could tolerate the Trendelenberg position at the time of line removal (i.e. purported breach), and causation (air embolism vs. stroke or some other cardiac event).

1. Evidence Regarding Lack of a Standard of Care for Patient Positioning During Central Line Removal

The trial court held that "the plaintiff failed to prove a true standard of nursing care for removal of a central line". *R.E. 1-6.* The court first acknowledged that Plaintiffs' experts testified

that removal of a central line required the following: 1) education of the patient about the procedure, 2) placing the patient in the Trendelenberg position, 3) directing the patient to take a deep breath, hold it, and bear down (the Valsalva maneuver), and 4) remove the line while placing gauze with pressure over the exit site. *Id.* Plaintiffs' appeal also cites this proposed standard. *See Appellants' Brief at p. 29.*

Both nurse Steele and Plaintiffs' daughter (the only individuals present during the procedure) testified at trial that Plaintiff was educated on the procedure prior to line removal. *T.T. page 149, line 29 through page 150, line 9* and *T.T. page 166, line 26 through page 168, line 14.* They too agreed that Plaintiff took a deep breath, held it, and appeared to bear down as instructed. *T.T. page 306, lines 10-21;* and *T.T. page 311, line 26 through page 312, line 20,* and *T.T. page 166, line 26 through page 168, line 14.* Finally, each witness testified that nurse Steele applied pressure with gauze as the line was removed. *Id.*

As such, the only relevant portion of Plaintiffs' purported standard of care on appeal is patient positioning. Plaintiffs cite certain medical literature, in addition to their own experts' testimony for the proposition that the standard of care requires patients to be placed in the Trendelenberg position during line removal. *See Appellants' Brief at p. 27-28.* Indeed, the testimony of Plaintiffs' experts was that patient positioning for removal of a central line required placement in the Trendelenberg, unless that position was not tolerated[9].

9

It must be noted that Plaintiffs' experts are, to say the least, out of practice with the proper method for removal of central lines. For instance, Dr. Lidgia Vives has not practiced medicine since the beginning of 2011, and she has not removed a central line since 1997. *T.T. page 74, line 25 through page 75, line 29.* Plaintiffs' nursing expert, Crystal Keller, R.N. never received a Bachelor's degree, or even an Associate's degree. *T.T. page 233, lines 14-19.* She too last removed a central line in 1997. *T.T. page 234, lines 24-26.* In fact, the sole source of income for Dr. Vives is legal-medical consultation, and from 1997-2010, nurse Keller's income was derived solely from the same. *T.T. page 75, lines 3-10* and *page 234, lines 18-23.*

However, contrary to Plaintiffs' suggestion, much more evidence was provided to the trial court, all of which indicated there was no national standard of care for patient positioning during a procedure of this nature. For instance, the following evidence was presented at trial:

1. Testimony from Defendant's expert, Dr. Jim Corder (an internist and anesthesiologist who is eminently familiar with placement and removal of central lines) that there was "no national standard of care for positioning". *T.T. page 346, lines 4-9.*

2. Medical literature and/or hospital policies indicating that certain hospitals in the United States place patients in the **Trendelenberg** position prior to removal. *See Plaintiffs' Record Excerpts.*

3. Medical literature and/or hospital policies indicating that certain hospitals in the United States place patients in the **supine** position prior to removal. *See Defendant's Trial Exhibit 5.*

4. Medical literature and/or hospital policies indicating that certain hospitals in the United States place patients in the **semi-Fowler's** position prior to removal. *See Defendant's Trial Exhibit 5.*

5. Medical literature and/or hospital policies indicating that certain hospitals in the United States allow patients to be placed with their **head above supine** prior to removal. *See Defendant's Trial Exhibit 5.*

6. Medical literature and/or hospital policies indicating that certain hospitals in the United States **do not address patient positioning** prior to removal. *See Defendant's Trial Exhibit 5.*

7. Testimony from Plaintiffs' expert, Dr. Lidgia Vives that, under certain circumstances, it was acceptable to remove a central line with the patient's head above supine. *T.T. page 81, lines 12-18.*

8. Testimony from Plaintiffs' expert, nurse Crystal Keller that a patient can be placed above supine when removing a central line if they cannot tolerate a lower position. *T.T. page 236, lines 15-28.*

And perhaps most compelling of all sources, Plaintiffs' expert, nurse Keller testified that the Infusion Nurses Society was the "authoritative" entity on removal of central lines. *T.T. page 244, lines 12-16.* In lauding the Infusion Nurses Society, nurse Keller stated, "It is basically – the Infusion

Nursing Society is recognized as an authoritative [and reliable] society, and so their practices and their standards are used in nursing." *T.T. page 209, lines 1-8.* Nurse Keller then was presented with "Policies and Procedures for Infusion Nursing", 4th Edition (2011), authored by the Infusion Nurses Society. *See Defendant's Trial Exhibit 5* (a copy of this document is also attached as *R.E. 51-56*). The Preface to this document states as follows:

> The Infusion Nurses Society (INS) is recognized as the global authority in infusion therapy, dedicated to exceeding the public's expectations of excellence by setting the standard for infusion care.
> ...
> This publication is intended to be used by nurses who develop organizational policies for infusion therapy, as well as to guide and enhance safe, efficient infusion delivery and quality patient care.
>
> The fourth edition of the *Policies and Procedures* complement INS indispensable publication, *Infusion Nursing Standards of Practice* (2011). Topics and terminology correspond to those in the *Standards*, together these resources provide a solid foundation for clinical applications of infusion therapies.[10]

Id.

Having established that the Infusion Nurses Society is a reliable, and even a global authority for infusion nursing, Ms. Keller conceded this entity was "authoritative" in establishing "standards ... for removing a non-tunneled CVAD (the type of central venous access device removed from the Plaintiff)". *T.T. page 244, lines 5-6* and *12-16*. Plaintiffs' other expert, Dr. Lidgia Vives further confirmed that the "Policy and Procedure for Infusion Nursing" should apply to all hospitals. *T.T. page 92, lines 4-6.* **In a watershed moment of the trial, nurse Keller conceded that the Infusion Nurses Society (citing "Policies and Procedures for Infusion Nursing", 4th Edition (2011)), required that patients be placed in the**

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[10] Defendant includes this portion of the Preface, only because Plaintiffs apparently draw some distinction between the *Infusion Nursing Standards of Practice* (2011) and the *Policies and Procedures for Infusion Nursing* (2011).

"sitting or recumbent position" during central line removal. *T.T. page 243, lines 9-15.* The document itself was entered as evidence for the trial court to review. *See Defendant's Trial Exhibit 5* (a copy of this document is also attached as *R.E. 51-56*).

As explained in Defendant's Motion for Summary Judgment, in response to Plaintiffs' Motion for Partial Summary Judgment, and as demonstrated at trial via exhibits and expert testimony (both Plaintiffs' and Defendant's experts), the methods of patient positioning during removal of a central line vary greatly from hospital to hospital, from practitioner to practitioner, and throughout the medical literature on the subject. Based on the above evidence, the trial court held there is no national standard of care for patient positioning during removal of a central line. *R.E. 1-6.* As such, there was ample and substantial evidence supporting the trial court's decision, and the ruling on this issue must be affirmed.

2. Evidence Regarding Plaintiff's Ability to Tolerate the Trendelenberg Position at the Time the Central Line Was Removed

In the Findings of Fact and Conclusions of Law, the trial court stated:

> Even if the plaintiff had been able to definitively establish the Trendelenberg position as the applicable standard of nursing care for central line removal, the facts also establish that such a standard would not be absolute, and under the right circumstances, a position other than Trendelenberg is acceptable. Here, the defendant presented evidence as to the plaintiff's inability to tolerate the Trendelenberg position. Therefore, even if that were the standard, the intolerance of the plaintiff to that position would allow for deviation from the standard without violation of the standard of care.

R.E. 1-6. In other words, had the trial court found that Trendelenberg was the standard of care, there would have been no breach of said standard, as evidence was presented indicating Plaintiff could not tolerate that position. *Id.*

Plaintiffs disagree with the trial court regarding the nature of the evidence presented at trial, instead asserting "there was no indication that Della Sumrall could not tolerate Trendelenberg and in fact the

evidence was un-contradicted that Mrs. Sumrall was repeatedly able to tolerate both supine and Trendelenberg ...". *See Appellants' Brief at p. 29.* According to Dr. Vives, "as tolerated", in terms of patient positioning, is "a subjective term", left to the judgment of the practitioner. *T.T. page 127, lines 24-29.* Contrary to Plaintiffs recollection of the evidence at trial, there was, indeed, substantial evidence that Plaintiff could not tolerate the Trendelenberg on the day in question. This evidence includes the following:

1. According to the testimony of nurse Steele, in the days leading up to the incident, Plaintiff informed her that she could not breathe when laying flat. *T.T. page 310, lines 9-15.*

2. Plaintiff had a variety of medical complications and comorbidities which, in the opinion of Plaintiffs' own expert, can affect the ability of a patient to be placed in certain positions. *T.T. page 247, lines 12-16.*

3. For instance, at the time of the incident, Plaintiff suffered from chronic obstructive pulmonary disease (COPD), had a partially collapsed lung (which had worsened between February 23, 2012 and February 29, 2012), and required tank oxygen. *T.T. page 246, lines 22-29* and *T.T. page 360, lines 21-29.*

4. Additionally, prior to the line removal, Plaintiff's total lung capacity was approximately 43% of predicted capacity, and her lung ventilatory flow rate was 17% of predicted value. *T.T. page 362, lines 6-23.*

5. Dr. Corder explained there were various other medical conditions suffered by the Plaintiff that explained her inability to tolerate the Trendelenberg, including a recent, major upper abdominal procedure (gallbladder removal), COPD, partial collapse of the right upper lung, and general poor lung function, which he described as "very, very bad". *T.T. page 358, line 6, beginning with "There" through page 363, line 11.*

6. Plaintiffs' expert, Dr. Vives testified that difficulty breathing in the Trendelenberg position could indicate that a patient cannot tolerate that position. *T.T. page 78, line 26 through page 79, line 1.*

7. Plaintiffs' nursing expert, Crystal Keller, also testified that difficulty breathing in a position indicates a patient cannot tolerate that position. *T.T. page 237, lines 6-10.*

8. Dr. Vives also testified that a partially collapsed lung (such as that of Plaintiff at the time of line removal) could result in difficulty breathing. *T.T. page 79, lines 26-28.*

In any event, the testimony of Plaintiff's attending nurse (both during and prior to this episode), indicates

that Plaintiff had difficulty breathing when laid flat, and as such, could not tolerate the Trendelenberg or supine positions. *T.T. page 310, lines 9-15.* Both of Plaintiffs' experts agreed that difficulty breathing in a certain position indicates the patient cannot tolerate that position. *T.T. page 78, line 26 through page 79, line 1* and *T.T. page 237, lines 6-10.* Additionally, Dr. Corder testified that individuals suffering from the comorbidities experienced by Plaintiff would likely not tolerate the Trendelenberg. *T.T. page 358, line 6, beginning with "There" through page 363, line 11.* As such, there is substantial evidence that, even if Plaintiffs' proposed standard of care were accepted, Plaintiff could not tolerate the Trendelenberg. Therefore, no breach of any such standard occurred and the court's ruling on this issue must be affirmed.

3. Evidence Regarding Stroke or Cardiac Event vs. Air Embolism

Judge Krebs held that, based on the evidence presented at trial, "the Court cannot conclude that Nurse Steele's removal of plaintiff's central line caused an air embolism that resulted in the damages claimed by the plaintiff." *R.E. 1-6.* Again, Plaintiffs assert on appeal that medical causation of an air embolism is "uncontradicted". *See Appellants' Brief.* And again, Plaintiffs are incorrect.

There was, in fact, a great deal of evidence indicating that Plaintiff suffered something other than an air embolism (such as a stroke or cardiac event), which accounts for her neurological condition. The evidence presented at trial includes the following:

1. Plaintiffs' sole causation expert, Dr. Lidgia Vives agreed that stroke was within the differential diagnosis given Plaintiff's course of events and symptoms. *T.T. page 94, lines 22-23.*

2. Dr. Vives admitted that such a stroke could have been caused if plaque broke loose in an artery when nurse Steele was applying pressure to the carotid. *T.T. page 95, lines 14-26.* She also agreed that the event occurred at the precise time that pressure was being applied to the carotid. *T.T. page 104, lines 2-8.*

3. Dr. Vives admitted Plaintiff was at a high risk for a stroke prior to the event. *T.T. page 96, lines 9-12.* The stroke risk factors present in Plaintiff's medical history included the following: high blood pressure, extensive smoking history, arterial circulation problems, previous heart attack, blockage

of several major arteries (including 100% blockage of the coronary artery, and 70% blockage of the carotid artery), diabetes, sedentary lifestyle, high cholesterol, COPD, and heart disease. *T.T. page 96, line 13 through page 100, line 4,* and *T.T. page 101, line 3 through page 103, line 22.*

4. Dr. Vives admitted that Plaintiff suffered from unilateral (one-sided) weakness following the incident, which according to her, is a classic sign of a stroke. *T.T. page 104, line 14 though page 106, line 4.* The unilateral symptoms include documented left-sided weakness. *Id.*

5. Dr. Vives conceded that either stroke or heart attack could have caused Plaintiff's low oxygen levels during the event. *T.T. page 111, line 21 through page 112, line 3.*

6. Dr. Vives also agreed that a heart attack was within the differential diagnosis for Plaintiff. *T.T. page 115, lines 1-4.* She did so based on the following symptoms and conditions of Plaintiff, all of which are indicators and/or risk factors for heart attack: hypotension, prior heart attack, diabetes, coronary artery disease, sedentary lifestyle, cardiovascular disease, COPD, extensive smoking history, twice the normal Troponin levels (which can be an indicator of an acute heart attack), low oxygen levels, and unstable angina ("chest pain, induced by lack of blood flow to the heart"). *T.T. page 115, line 5 through page 116, line 16,* and *T.T. page 118, line 25 through page 119, line 13.*

7. Dr. Edward Dvorak, Plaintiff's surgeon, testified at trial that he did not believe his patient suffered from an air embolism. *T.T. page 405, lines 5-29.* Dr. Dvorak reasoned, "[w]e never saw any evidence of it on any of the work-up. That, combined with the fact that it was a very small catheter, made me think that a venous air embolus would be unlikely." *Id.* Instead, he considered sudden cardiac arrest or stroke as the cause of Plaintiff's injury. *T.T. page 406, lines 12-25.*

8. Dr. Corder, Defendant's expert, testified that Plaintiff suffered from numerous risk factors for stroke prior to the incident, including peripheral artery disease, blockage of the right carotid artery, coronary artery disease, hypertension, episodes of hypotension, history of smoking 1-2 packs per day for 50 years, all of which "tremendously increased risk of a stroke." *T.T. page 368, lines 4-26.*

9. Dr. Corder testified that the central line being placed in the external jugular vein also indicates the event was not an air embolism, as this vein collapses much more easily than the internal jugular vein (especially when sitting upright), and is much easier to compress, thereby preventing air to enter the system. *T.T. page 352, line 7 through page 354, line 16.*

10. Additionally, Dr. Corder testified that Plaintiff's presentation immediately following the event supports his opinion that the event was a stroke, as opposed to an air embolism. This includes the fact that nurse Steele held pressure on the exit site for approximately one minute before the event occurred (usually symptoms occur immediately), Plaintiff's left-sided weakness, and her one-sided facial drooping. *T.T. page 367, lines 6-13, T.T. page 369, lines 2-23,* and *T.T. page 372, lines 1–11*.

11. Dr. Corder testified, like Dr. Dvorak, that the occurrence of an air embolism is extremely unlikely given the small size of the line removed. *T.T. page 372, lines 12-25.*

12. Dr. Corder testified there was no radiographic evidence, no laboratory-based results, or any other diagnostic evidence of an air embolism. *T.T. page 374, lines 6-21.*

13. Rather, he testified, there was clinical evidence of a stroke, and diagnostic evidence of a heart attack. *T.T. page 374, line 21 through page 376, line 14.*

14. Based on the above, Dr. Corder testified it was his opinion, as an anesthesiologist and internist, that Plaintiff suffered a stroke. *T.T. page 379, line 27-28.*

15. All of Dr. Corder's opinions were stated with a reasonable degree of medical probability. *T.T. page 348, lines 19-23.*

Therefore, despite Plaintiffs' suggestion to the contrary, a wealth of evidence was presented at trial indicating Plaintiff suffered from a stroke and/or heart attack, as opposed to an air embolism. That evidence came in the form of Plaintiffs' expert testimony, defense expert testimony, clinical evidence, diagnostic evidence, and Plaintiff's presentation/symptomology. As such, the trial court's ruling on causation should remain undisturbed.

F. Plaintiffs' Claims of "Cumulative Errors" Are Unfounded

Plaintiffs allege numerous individual errors which they claim combined to prevent a fair trial of this matter. *See Appellants' Brief at p. 33.* Pursuant to the "cumulative-error doctrine," individual errors, which are not reversible in themselves, may combine with other errors to make up reversible error, where the cumulative effect of all errors deprives the defendant of a fundamentally fair trial; however, if there are no individual errors, there can be no cumulative error that warrants reversal[11]. *Lawrence v. State,* 116 So.3d 156 (Miss. App. 2012).

The majority of the alleged errors suggested by Plaintiffs in this section have been fully briefed above

[11] It is unclear whether the "cumulative errors doctrine" applies solely to criminal matters. To the extent the "cumulative errors doctrine" is inapplicable to this case, Defendant argues this portion of the appeal is without merit.

(i.e. allowing Dr. Corder to testify regarding standard of care, denial of Plaintiffs' Motion for Partial Summary Judgment, allegedly holding Plaintiffs to an improper burden of proof). Defendant rests on the arguments made above regarding these items. In addition to these assignments of error, Plaintiffs find fault with in the trial court's "refus[al] to enforce [a] duly served subpoena" on nurse Steele, in requiring that Dr. Dvorak be compensated for his deposition time, by refusing to award attorney's fees for time expended by Plaintiffs' counsel in preparation for the deposition of nurse Steele, and in granting dismissal of Ocean Springs Hospital as a Defendant. *See Appellants' Brief at p. 33-34.*

1. The Deposition Subpoena of Nurse Chequita Steele

Plaintiffs claim Judge Krebs "refused to enforce a duly served subpoena and notice of deposition". *See Appellants' Brief at p. 33.* After filing the Complaint, on June 19, 2012, before Defendant even had an opportunity to file a responsive pleading, Plaintiffs' counsel requested the deposition of Chequita Steele, an employee of the Defendant. *C.R. 45-57.* Counsel for Plaintiff made several similar requests on June 19, 2012, seeking deposition dates before July 31, 2012. *Id.* Defendant immediately informed counsel that a conflict existed in the form of a medical malpractice trial set for July 23-27, 2012. *Id.* Additionally, Defendant requested that traditional written discovery be completed prior to deposition of any party. *Id.*

In an attempt to come to a mutually acceptable alternative, defense counsel called counsel opposite. *Id.* A voicemail was left, but no return call was forthcoming. *Id.* Plaintiff's counsel, undeterred, made one last demand for deposition dates (the same dates offered in past demands). *Id.* Defendant responded by offering the date of September 24, 2012. *Id.* Plaintiff responded by unilaterally noticing the deposition of the Defendant for July 16, 2012. *Id.* In an effort to avoid Court intervention, defense counsel sent correspondence seeking alternative dates for the deposition. *Id.* Instead of making any effort to reconcile the discovery issue, Plaintiff requested that Defendant file a Motion to Quash. *Id.* Defendant did so,

Plaintiffs responded, and a joint teleconference with the trial court was held, the result of which was an Order denying the relief requested by Plaintiff. *C.R. 45-57,* and *73.*

The bases of Defendant's Motion to Quash were various conflicts with the dates offered by Plaintiffs' counsel, including a then-pending medical malpractice trial and trial preparations. *C.R. 45-57.* Defendant also sought to obtain written discovery responses prior to moving forward with the deposition of Defendant's key fact witness. *Id.* Pursuant to Mississippi Rule of Civil Procedure 26(d), the trial court was vested with the power to issue a protective order quashing the deposition as noticed. Miss. R. Civ. P. 26(d). Clearly, the court had the authority to act as it did in this matter. Miss. R. Civ. P. 26(d). Additionally, the deposition of nurse Steele actually went forward on July 31, 2012 (two weeks after it was originally noticed), and as such, no harm resulted to Plaintiff. Based on the above, the trial court made no error in this regard, and this ruling must be affirmed.

2. Dr. Dvorak's Deposition

Plaintiffs also criticize Judge Krebs's ruling that required Dr. Dvorak, a non-party, to be paid for his time at deposition. *See Appellants' Brief at p. 33.* Plaintiffs' counsel requested the deposition of Dr. Dvorak from his attorney, John Banahan, Esq. *C.R. 115-117.* Counsel for Dr. Dvorak provided a deposition date, contingent upon payment to Dr. Dvorak for the time spent away from his office. *Id.* Plaintiffs' counsel refused, and the disagreement prompted Dr. Dvorak to file a Motion for Protective Order, requesting payment of reasonable fees for his time. *Id.*

The trial court issued a protective order in favor of Dr. Dvorak. *C.R. 123.* This ruling prompted Plaintiffs to file an Interlocutory Appeal, an appeal that was later voluntarily dismissed. *C.R. 572.* In submitting to voluntary dismissal of the appeal, Plaintiffs' agreed to comply with the trial court's protective order. *Id.* To the extent Plaintiffs have waived this portion of their argument, Defendant would seek denial

of the current appeal on this issue. In any event, Plaintiff can claim no harm from the Dvorak ruling, as he ultimately testified at trial. Therefore, the trial court's ruling must be upheld.

3. Attorneys Fees Associated With Deposition Preparation for Nurse Steele

As stated above, Plaintiffs unilaterally noticed the deposition of the Defendant for July 16, 2012. Pursuant to court order, the deposition did not go forward on that date. Undaunted, Plaintiffs filed a motion for relief, seeking attorneys fees in the amount of $2,250.00 for counsel's preparation time. *C.R. 78-78.* The trial court entered an order denying the motion, noting that counsel for Plaintiffs "would have had to prepare for the deposition regardless of what date it was taken ... [which ultimately] occurred about two weeks later". *C.R. 294.* As stated in the trial court's order, Plaintiffs' counsel's preparation efforts were utilized shortly after the cancelled deposition, thus there was no harm to Plaintiffs. More importantly, declining to award attorneys fees of this nature is well within the trial court's discretion, and as such, no error occurred. *Illinois Central Railroad Company v. Broussard,* 19 So.3d 821 (Miss. App. 2009). Based on the above, the court's ruling on this matter should be affirmed.

4. Dismissal of "Ocean Springs Hospital" as a Defendant

As stated above, on or about March 1, 2013, Plaintiff filed a Motion to Substitute Correct Name Pursuant to Rule 9(h). *C.R. 322.* The motion sought to replace Defendant "Singing River Hospital Systems" with "Singing River Health System", but failed to request dismissal of "Ocean Springs Hospital" from the suit. *Id.* Defendant filed a response to this motion, and in the alternative, moved to dismiss "Ocean Springs Hospital" as a defendant, as it is not a proper legal entity. *C.R. 433-436.*

In support of this motion, Defendant attached Singing River Health System Bylaws, Correspondence from the Jackson County Board of Supervisors, an Independent Auditing Report, Correspondence from the Internal Revenue Service, and documentation from the United States Department of Health, Education, and

Welfare, each of which demonstrated that Singing River Health System (the proper party to this action) is a governmental entity comprised of two divisions: Singing River Hospital, located in Pascagoula, MS, and Ocean Springs Hospital, located in Ocean Springs, MS. *Id.* On August 6, 2013, the trial court granted Plaintiffs' Motion to Substitute. *C.R. 784.* In the same order, the court also granted Defendant's Motion to Dismiss "Ocean Springs Hospital." *C.R. 784.*

On appeal, Plaintiffs cite the Answer filed by Defendant as proof that "Ocean Springs Hospital" is a proper defendant in this matter. *See Appellants' Brief at p. 34.* Additionally, Plaintiffs claim Defendant did not "produce any evidence to justify dismissing" Ocean Springs Hospital. *Id.* Each such assertion is demonstrably false. Paragraph 2 of the Complaint in this matter states:

> A. Defendant Singing River Hospital Systems is a hospital system comprised o Singing River Hospital in Pascagoula, Mississippi and Ocean Springs Hospital in Ocean Springs, Mississippi.
>
> B. Defendant Ocean Springs Hospital is a hospital located and doing business in Ocean Springs, Mississippi.

C.R. 24-28. In response, Defendant, Singing River Health System stated:

> (A). Defendant denies the allegations contained in Paragraph 2(A). Singing River Health System, improperly named as Singing River Hospital System and Ocean Springs Hospital, is a community owned hospital system comprised of two divisions, namely, Singing River Hospital, located in Pascagoula, Jackson County, Mississippi, and Ocean Springs Hospital, located in Ocean Springs, Jackson County, Mississippi.
>
> (B). Defendant denies the allegations contained in Paragraph 2(B). Singing River Health System, improperly named as Singing River Hospital System and Ocean Springs Hospital, is a community owned hospital system comprised of two divisions, namely, Singing River Hospital, located in Pascagoula, Jackson County, Mississippi, and Ocean Springs Hospital, located in Ocean Springs, Jackson County, Mississippi.

C.R. 30. As such, in its Answer, Defendant properly distinguished the facility, "Ocean Springs Hospital" from the Defendant, Singing River Health System.

Furthermore, in support of its motion to dismiss "Ocean Springs Hospital", Defendant provided a large number of uncontested documents demonstrating that "Ocean Springs Hospital" is not a proper defendant. Finally, Plaintiffs cannot cite any harm occasioned by the ruling. Based on the above, the court's ruling on this matter must be affirmed.

The rulings challenged by Plaintiffs are not individually erroneous. However, to the extent this Court finds fault with said rulings, their cumulative effect did not prevent Plaintiffs from receiving a fair trial. Indeed, there was no harm claimed or resulting from any above holding. Therefore, Plaintiffs appeal on these issues is without merit.

V. CONCLUSION

In sum, the trial court did not commit reversible error in allowing Dr. Corder to testify regarding the standard of care, as he was sufficiently designated, qualified, and tendered to do so. Similarly, the trial court committed no error in denying Plaintiffs' Motion for Partial Summary Judgment, as Defendant presented sufficient evidence to overcome same. The court did not hold Plaintiffs to any evidentiary burden beyond preponderance of the evidence, and the weight of the evidence supported the court's Findings of Fact and Conclusions of Law. Finally, there were no individual or cumulative errors in the complained-of rulings. Therefore, based on the foregoing, the trial court's actions and ultimate holding should be affirmed, with all costs assessed to Plaintiffs.

Respectfully submitted,

SINGING RIVER HEALTH SYSTEM

/s/ *Joshua W. Danos*

By: _____

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CERTIFICATE OF SERVICE

I, Joshua W. Danos, hereby certify that I have this day caused to be filed the foregoing BRIEF OF APPELLEE, SINGING RIVER HEALTH SYSTEM via the Supreme Court's MEC system, which will send electronic notice to the following:

Robert W. Smith, Esq.
528 Jackson Avenue
Ocean Springs, MS 39564

I have also this day hand-delivered a true and correct copy to the following:

Honorable Robert P. Krebs
Circuit Court Judge of Jackson County
3104 South Magnolia Street
Pascagoula, MS 39567

This the 11th day of February, 2015.

/s/ *Joshua W. Danos*

JOSHUA W. DANOS

ADDENDUM - SUPPORTING AUTHORITIES

West's Annotated Mississippi Code
Mississippi Rules of Court State
Mississippi Rules of Civil Procedure
Chapter V. Depositions and Discovery

M.R.C.P. Rule 26

Rule 26. General Provisions Governing Discovery

Currentness

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; and requests for admission. Unless the court orders otherwise under subdivisions (c) or (d) of this rule, the frequency of use of these methods is not limited.

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General*. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the issues raised by the claims or defenses of any party. The discovery may include the existence, description, nature, custody, condition and location of any books, documents, electronic or magnetic data, or other tangible things; and the identity and location of persons (i) having knowledge of any discoverable matter or (ii) who may be called as witnesses at the trial. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Insurance Agreements*. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) *Trial Preparation: Materials*. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including that party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of that party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. Rule 37(a)(4) applies to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made

is: (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) *Trial Preparations: Experts*. Discovery of facts known and opinions held by experts, otherwise discoverable under subsection (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subsection (b)(4)(C) of this rule, concerning fees and expenses, as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subsections (b)(4)(A)(ii) and (b)(4)(B) of this rule, and (ii) with respect to discovery obtained under subsection (b)(4)(A)(ii) of this rule, the court may require, and with respect to discovery obtained under subsection (b)(4)(B) of this rule, the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) *Electronic Data*. To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot-through reasonable efforts-retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court may also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

(c) Discovery Conference. At any time after the commencement of the action, the court may hold a conference on the subject of discovery, and shall do so if requested by any party. The request for discovery conference shall certify that counsel has conferred, or made reasonable effort to confer, with opposing counsel concerning the matters set forth in the request, and shall include:

1. a statement of the issues to be tried;

2. a plan and schedule of discovery;

3. limitations to be placed on discovery, if any; and

4. other proposed orders with respect to discovery.

Any objections or additions to the items contained in the request shall be served and filed no later than ten days after service of the request.

Following the discovery conference, the court shall enter an order fixing the issues; establishing a plan and schedule of discovery; setting limitations upon discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the case.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.

The court may impose sanctions for the failure of a party or counsel without good cause to have cooperated in the framing of an appropriate discovery plan by agreement. Upon a showing of good cause, any order entered pursuant to this subdivision may be altered or amended.

(d) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending, or in the case of a deposition the court that issued a subpoena therefor, may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the discovery not be had;

(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition after being sealed to be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court;

(9) the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, oppression or undue burden or expense, including provision for payment of expenses attendant upon such deposition or other discovery device by the party seeking same.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. Rule 37(a)(4) applies to the award of expenses incurred in relation to the motion.

(e) Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(f) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement that party's response with respect to any question directly addressed to (A) the identity and location of persons (i) having knowledge of discoverable matters, or (ii) who may be called as witnesses at the trial, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the testimony.

(2) A party is under a duty seasonably to amend a prior response if that party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

Credits

[Amended effective March 1, 1989; March 13, 1991; April 13, 2000; May 29, 2003.]

Editors' Notes

ADVISORY COMMITTEE HISTORICAL NOTE

Effective April 13, 2000, Rule 26(c) was amended to allow the court on its own motion to convene a discovery conference, 753-754 So. 2d XVII (West Miss.Cas. 2000).

Effective March 13, 1991, Rule 26(b)(1)(ii) was amended to delete the oral testimony of witnesses from the listing of matter that might be discovered by a party. Rule 26(d) was amended to provide that in the case of depositions protective orders might be made by the court that issued a subpoena therefor. 574-576 So. 2d XXIII (West Miss. Cas. 1991).

Effective March 1, 1989, Rule 26(b)(1) and Rule 26(f)(1) were amended to provide for the identification of (and supplementation of the prior identification of) those, in addition to experts, who may be called as witnesses at the trial. 536-538 So. 2d XXIV (West Miss. Cas. 1989).

Notes of Decisions (130)

Rules Civ. Proc., Rule 26, MS R RCP Rule 26
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End of Document

West's Annotated Mississippi Code
Mississippi Rules of Court State
Mississippi Rules of Civil Procedure
Chapter V. Depositions and Discovery

M.R.C.P. Rule 37

Rule 37. Failure to Make or Cooperate in Discovery: Sanctions

Currentness

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate Court*. An application for an order may be made to the court in which the action is pending.

(2) *Motion*. If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rules 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(d).

(3) *Evasive or Incomplete Answer*. For purposes of this section, an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of Expenses of Motion*. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party of the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expense unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply With Order.

(1) *Sanctions by Court*. If a deponent fails to be sworn or to answer a question after being directed to do so by the court, the failure may be considered a contempt of court.

(2) *Sanctions by Court in Which Action Is Pending*. If a party or an officer, director, or managing agent of a party or a person designated under Rules 30(b)(6) or 31(a) to testify in behalf of a party fails to obey an order to provide or permit discovery, including an order made under subsection (a) of this rule, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders.

In lieu of any of the foregoing orders or in addition, thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable under Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rules 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subsections (A), (B), and (C) of subsection (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order under Rule 26(d).

(e) Additional Sanctions. In addition to the application of those sanctions, specified in Rule 26(d) and other provisions of this rule, the court may impose upon any party or counsel such sanctions as may be just, including the payment of reasonable expenses and attorneys' fees, if any party or counsel (i) fails without good cause to cooperate in the framing of an appropriate discovery plan by agreement under Rule 26(c), or (ii) otherwise abuses the discovery process in seeking, making or resisting discovery.

Notes of Decisions (169)

Rules Civ. Proc., Rule 37, MS R RCP Rule 37
Current with amendments received through 6/15/2014

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